



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-04-01

QUESTION

May the Dukes County Commission appoint one of its members to the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority ("the Authority") board of directors where section 15A of the conflict of interest law, G.L. c. 268A, provides that a county commissioner is not eligible for appointment to any position under the supervision of the county commission?

ANSWER

Yes, the Dukes County Commission may so appoint one of its members. As the County Commissioners' role is limited to appointing someone to and for cause removing that person from the position, we conclude that the Authority board of directors position is not "under the supervision" of the commissioners.

FACTS

You are a Dukes County commissioner. The commissioners are elected and, although authorized a salary by statute¹, have voted to forgo any compensation. The commissioners appoint and can remove for cause one of the members of the Authority's board of directors.² The commissioners have no other power over their appointee or over the Authority.

The Authority is a body corporate and a public instrumentality.³ It consists of five persons to be appointed as follows: one resident of the town of Nantucket by the selectmen thereof; one resident of the county of Dukes County by the county commissioners thereof⁴; one resident of the town of Falmouth by the selectmen thereof; and one resident of the town of Barnstable by the town council thereof; and one resident of the city of New Bedford by the mayor thereof with the approval of the city council. Members serve without compensation.⁵

The Authority's mandate is to operate a ferry, and in that connection, to issue bonds. Each year the Authority must report to the Governor and to the General Court.⁶ The state auditor will audit the Authority yearly.⁷ There is no requirement that the Authority make any reports to the County Commissioners. If the Authority has a year-end deficiency, it must report that to the state treasurer. The state then assesses that deficiency on the Towns of Falmouth, New Bedford and Nantucket and on Dukes County.⁸

We have previously determined that the Authority is a state agency for conflict of interest law purposes.⁹

DISCUSSION

Section 15A of G.L. c. 268A provides :

No member of a county commission or board shall be eligible for appointment or election by the members of such commission or board to any office or position under the supervision of such commission or board. No former member of such commission or board shall be so eligible until the expiration of thirty days from the termination of his service as a member of such commission or board.

The phrase “under the supervision of” is not defined in G.L. c. 268A nor does it appear among the terms and phrases defined in G.L. c. 4. We therefore look to “the common and approved usage of the language.”¹⁰ We apply common experience and common sense in interpreting such words as they appear in the conflict of interest law.¹¹

“Supervision” is “the act of managing, directing or overseeing persons or projects”¹² or “[t]he act, process or occupation of supervising: direction, inspection, and critical evaluation: oversight.”¹³ Further, “supervise” means “To coordinate, direct, and inspect continuously and at first hand the accomplishment of; oversee with the powers of direction and decision the implementation of one’s own and another’s intentions.”¹⁴

The Supreme Judicial Court has defined “supervision” as follows: “‘Supervision’ is the act of one who supervises and to supervise is to oversee, to have oversight of, to superintend the execution of or performance of (a thing), for the movements or work of (a person); to inspect with authority; to inspect and direct the work of others.”¹⁵ By virtue of its plain dictionary meaning and judicial interpretations “supervision” appears to require a degree of ongoing oversight and direction that is not present in this case. The Commission’s own precedents are consistent with this position.

In *EC-COI-92-30* the issue was whether for purposes of G.L. c. 268A, §21A (the municipal counterpart to §15A) the city clerk was “under the supervision” of the city council such that a councilor could not be appointed city clerk without his first resigning and waiting 30 days. The city charter made clear that the city clerk acted as the city council’s clerk and was to perform such duties as are assigned by city council. As noted in the opinion, “The relationship ... includes detailed direction and oversight of activities amounting to an agency relationship, and at least here, the power to discharge.” Given those oversight responsibilities, the Commission concluded that the city clerk position was “under the supervision” of the council.

In *EC-COI-84-147* a state college had incorporated a holding company to assist with certain college functions. The state college’s board of trustees wanted to appoint two of its own members to the holding company’s board of directors. The Commission

found that the non-profit holding company's activities were not subject to the direct management and regulation by the college's board and therefore, § 8A (the state counterpart to §15A) did not restrict the board from appointing its own members to the holding company board. The Commission noted in that opinion:

The threshold for finding "supervision" for Section 8A purposes is higher than for finding the factor of "exercisable government control" in establishing jurisdiction under Chapter 268A. The fact that company board members are selected by, and serve at the pleasure of the University Board establishes a sufficient nexus between the University and the company to bring the latter under the umbrella of the term state agency within the meaning of Chapter 268A. ... That selection power does not, however, constitute "supervision" under Section 8A.

EC-COI-90-3 applied *84-147's* analysis to a similar situation where a college's trustees appointed two members of a college's fund-raising foundation's board of directors. Again because there was no direct management or control of these positions by the trustees, the Commission concluded they were not "under the supervision" of the trustees for §8A purposes.¹⁶

It might be argued that implicit in the power to remove is a responsibility to perform a certain minimal degree of ongoing assessment of job performance that could be construed, in effect, as "supervision." We disagree. While the enabling statutes of various state authorities can be cited as offering examples of the appointing person also having the power to remove, usually for cause,¹⁷ there is no implication that the appointing person has the power to "coordinate, direct, and inspect continuously and at first hand" the authority's activities. Indeed that very point appears to have been addressed in *EC-COI-84-147*.

We note that under G.L. c. 159 App. §1-13 the Authority reports annually to the Governor and the General Court and its books are annually audited by the state auditor. There is no reporting requirement to the county commissioners. Also G.L. c. 159 App. §1-14 creates a finance advisory board, which has the power to review the Authority's annual budget. The county commissioners have no such power.¹⁸

In sum, where the County Commissioners' role is limited to the appointment and potential removal of one Authority board member, and where they do not otherwise direct, oversee or inspect the Authority's work, we conclude that the Authority's board of directors position is not "under the supervision" of the commissioners. Therefore, the Dukes County Commissioners may appoint one of their own members to the Authority's board of directors.¹⁹

DATE AUTHORIZED: February 19, 2004

¹ G.L. c. 34, §5.

² G.L. c. 159 App. § 1-3.

³ G.L. c. 159 App. § 1-3.

⁴ The Authority's enabling legislation does not require that a Dukes County commissioner serve on the Authority's board.

⁵ G.L. c. 159 App § 1-3.

⁶ G.L. c. 159 App § 1-13.

⁷ *Id.*

⁸ G.L. c. 159 App § 1-9.

⁹ *EC-COI-89-29; 86-23.*

¹⁰ G.L. c. 4, § 6 (Third). See *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 425 (1992).

¹¹ *EC-COI-98-02.*

¹² *Black's Law Dictionary* (7th Ed. 1999).

¹³ *Webster's Third New International Dictionary* (1993).

¹⁴ *Id.*

¹⁵ *Fluet v. McCabe*, 299 Mass. 173, 179 (1938). In *Fluet* the Court ruled that even though the city council had, by ordinance, "full supervision" for repair of public buildings, a department head could contractually obligate the city for certain building repairs. See also *Department of Community Affairs v. Massachusetts State College Building Authority*, 378 Mass. 418,430 (1979). The Court there also cited to *Webster's New Int'l Dictionary* 2533 (2nd Ed. 1959).

¹⁶ See also *EC-COI-84-25* (executive director position of foundation not an "office or position under the supervision of the ... Board" because the "Foundation is independent from the Board with respect to its finances, operational control, and organization." *Id.* at p. 2.)

¹⁷ See, e.g., G L. c. 91 App. §1-2 (governor appoints and removes members of Massachusetts Port Authority).

¹⁸ Under G.L.c. 159, § 1-9 the County Commissioners are required to collect from the county's towns any Authority year-end deficiency paid by the state and assessed on the county by the state. The County Commissioners, however, have no discretion in this regard to deal with the Authority. They simply act as a collection agent for the state.

¹⁹ That person would be subject to a number of conflict of interest law issues that would arise from his dual status as a state and county employee. See, e.g., G.L. c. 268A, §§ 4, 6, 11 and 23. Because those issues are not material to the question presented in your opinion request, and because they do not raise any novel concerns that would warrant a formal opinion, we do not address them in this opinion.